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No. 79-538

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

MAMMOTH BULK CARRIERS, LTD.,
Petitioner,

vs.

JAMES D. BACHTEL, DONNA BACHTEL,
and TWIN HARBOR STEVEDORING CO.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF PETITION

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This supplemental brief is submitted to comment upon the effects of the Court's decision in *Scindia Steam Navigation Co. v. De Los Santos,* No. 79-512 (April 21, 1981).

As the Court of Appeals in this case relied upon the standard it had announced in the *Scindia* case as authority for the denial of judgment notwithstanding the verdict below, that aspect of the case should be reviewed by the Court of Appeals in the light of this Court's decision in *Scindia.*

There is, however, another reason for review and reversal under the *Scindia* decision. It is the lower courts' misuse of the Safety and Health Regulations for Longshoring, against the vessel, in direct conflict with the teaching of *Scindia.*

Here the regulation was submitted to the jury for its consideration as evidence of shipowner negligence and the Court of Appeals approved of its being so used (Appendix to Petition for Certiorari, A-17). The regulation in question[1] clearly concerned procedure during stevedore operations. To bind the shipowner by the regulation, as the Court of Appeals would do, would necessarily involve shipowner inspection and supervision of such operations. But this court has held in *Scindia* that the shipowner has no such duty of inspection or supervision of the operations.[2]

Moreover, this Court in *Scindia* has said that in order to show the stevedore's legal duty and the vessel's justifiable expectations, the jury "should . . . be made aware of the scope of the stevedore's duty under the positive law".[3] The positive law includes 33 U.S.C. Section 941(a) and the regulations issued under it to govern stevedore safety practice. When such regulations are to be shown to the jury to establish the vessel's justifiable reliance, they cannot, logically, at the same time be submitted as evidence of dereliction by the shipowner itself. Thus, the record shows plain error below entitling petitioner at least to a new trial under proper instructions.

Accordingly, certiorari should be granted and the case set down for argument, if it be needed, on the second question presented, having to do with misuse of the regulation, or

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[1] 29 C.F.R. Section 1918.32(b).

[2] *Scindia Steam Navigation Co. v. De Los Santos*, No. 79-512, slip op. at 11 (U.S. Sup.Ct. April 21, 1981).

[3] *Id.*, at 19.

remanded for reconsideration in light of this Court's teachings in *Scindia*, with directions to grant a new trial on the basis of the erroneous instruction on the regulation, in the event of a judgment notwithstanding the verdict not being granted.

Respectfully submitted,

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